United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1485

ORIGINAL

7-15-74

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-1485

UNITED STATES OF AMERICA ex rel. LARRY DAVID HAYDEN,

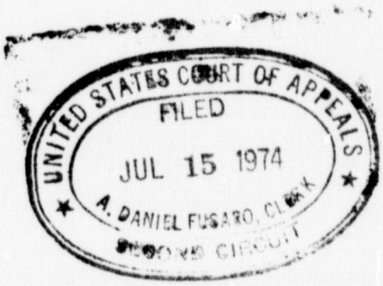
Petitioner-Appellant,

-against-

JOHN R. ZELKER, Warden of Greenhaven State Correctional Facility, Stormville, New York,

Respondent-Appellee.

REPLY BRIEF FOR PETITIONER-APPELLANT



MICHAEL H. RAUCH
MELVIN WEINBERG
Attorneys for
Petitioner-Appellant
Office and P.O. Address
120 Broadway
New York, New York 10005

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
COUNSELORS AT LAW
120 BROADWAY
NEW YORK

TABLE OF AUTHORITIES

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-1485

UNITED STATES OF AMERICA ex rel. LARRY DAVID HAYDEN,

Petitioner-Appellant,

-against-

JOHN R. ZELKER, Warden of Greenhaven State Correctional Facility, Stormville, New York,

Respondent-Appellee.

REPLY BRIEF FOR PETITIONER-APPELLANT

The State's Brief chooses to ignore the essential point being made by Petitioner Hayden and thereby simply avoids dealing with the reason why the State's continued confinement of Larry Hayden is so unconscionable: Larry Hayden is being incarcerated indefinitely, not just for a finite period slightly longer than the current maximum of seven years. The overwhelming impact of indefinite incarceration, for whatever reason, is the basis for the Supreme Court's repeated statements that equal protection

standards must be scrupulously accorded to a person so confined. Jackson v. Indiana, 406 U.S. 715 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); Baxstrom v. Herold, 383 U.S. 107 (1966). See also, Cross v. Harris, 418 F.2d 1095, 1101-02 (D.C. Cir. 1969); United States ex rel. Schuster v. Herold, 410 F.2d 1071 (2d Cir. 1969).

The State, without so much as a single comment, completely ignores these cases and their clear application to the discrimination suffered by Larry Hayden as demonstrated in Petitioner Hayden's main brief. Instead, it attempts to create the misleading impression that Larry Hayden is just another prisoner trying to take advantage of lighter sentences available to others. Larry Hayden is not attempting to take advantage of New York's change in the maximum sentence for his crime from ten to seven years - the situation presented in the cases cited by the State on page 7 of its brief. All those cases merely deny applicability of earlier release under the changed law, but are distinguishable from the instant case which involves the constitutionality of keeping Larry Hayden in a special sex offender category after the elimination of that category. It is the fact that in 1964 Larry Hayden was, as an alternative to a finite sentence, placed in a special class of prisoners who might potentially be imprisoned for

the rest of their lives, that the time differentiation between those who commit a crime before and after a certain date cannot stand.

The State argues that it has the power to change its laws in various ways and to provide for non-abatement of prosecutions in connection with such changes. From this it asks the Court to hold that Larry Hayden is entitled to no relief because there are no restraints on that power. Brief for Appellee, pp. 8-11. We, of course, do not dispute that the State may provide for non-abatement. But we maintain that the State's power to do so, like other powers of the State, is subject to constitutional limitations. The issue in this case is whether the State's exercise of that power, as applied to Larry Hayden, meets the standards of the Equal Protection Clause.

In view of the justification it offers for the discrimination at issue here, it is no wonder that the State maintains that "such justification is not necessary." Brief for Appellee, at p. 11. It argues that it has an interest in experimenting in penal reform and in "changing decisions concerning the expenditure of funds," Brief for Appellee, pp. 12-14, which interest purportedly provides the rational basis or compelling interest necessary to justify the discrimination to which Larry Hayden is

subjected. The assertion would be shocking, were it not for the fact that the State has consistently ignored, throughout its brief, the essential point of the equal protection problem. Indeed, one can hardly imagine a weaker justification for a classification which permits the confinement of Larry Hayden for the rest of his life. No amount of experimenting or cash-shortage can condone the disparity which surfaces in this case between a potential life sentence and a maximum of seven or ten years.

In addition, the State nowhere says that the repeal of its special sex offender classification was in fact motivated by the Legislature's adopting new applied penological theories or by fiscal problems. Its argument is a purely hypothetical one: that the Legislature "could have decided that it no longer wished to expend its funds" on treatment and detention of persons like Larry Hayden (Brief for Appellee, p. 13). It would indeed be a travesty of justice to countenance life imprisonment for Larry Hayden on the basis of a hypothetical reason, and such a flimsy one at that. In truth, the reason for the change was more likely that the so-called "experimental program" that the State touts in its brief was a farce. One New York court, incensed with the treatment received by a one-day-to-life prisoner under the "experimental

program", pertinently observed:

> "There is no doubt but that the Legislature intended that rehabilitative treatment be concomitant with such sentences (N.Y. Legis. Doc., 1950, No. 56, page 44). The realization that only lip service was being paid to this intention was, perhaps, a major reason that the revised Penal Law does not contain a similar provision." People v. Hutchings, 74 Misc. 2d 15, 17, 343 N.Y.S. 2d 845, 847 (Cortland County Court, 1973).*

Can Larry Hayden, in all fairness, continue to remain indefinitely in prison ostensibly for the application of an "experimental program" repealed by the Legislature apparently because it was found to be ineffectual?

In any event, regardless of the reason for the repeal of Sections 483-a and 2189-a of the Penal Law of 1909, the only conscionable conclusion in an equal protection sense is to place Larry Hayden in the same category as

---

* Later, setting aside the sentence because no treatment whatever was being given to the prisoner, the same court said:

> "I am frankly appalled at this entire charade. I am aware of the defenses which will be advanced detailing the lack of funds, personnel and facilities, but the fact is we deal here with a human being who, for the better part of his life, has been the victim of these same excuses. As long as indifference and dereliction of duty of this type are allowed to continue we all can be added to the list of victims in one context or another." People v. Hutchings, 74 Misc. 2d 914, 916 347 N.Y.S. 2d 268, 270 (1973).

persons committing after September 1, 1967, the same crime as he did. We do not suggest that in every case in which a person is indicted under a repealed statute he must benefit from the repeal. We do maintain that where the effect of the time-related discrimination is to subject certain individuals because of their status to indefinite incarceration, then previously-cited Supreme Court decisions compel the conclusion that the Equal Protection Clause has been violated.

The State points to the availability of parole for Larry Hayden. The deficiencies of this procedure -- both equitably and constitutionally -- are manifold. The statutes expressly deny good time credit to a person serving an indefinite one-day-to-life sentence. N.Y. Correction Law, §§ 230(2), (4), 803 (1). Moreover, Larry Hayden's occasional appearances before the parole board cannot be considered a valid substitute for the constitutionally mandated periodic review of his indefinite confinement.

The standards for release of Larry Hayden in a proceeding before the parole board are more stringent than for others committed involuntarily to correctional institution hospitals. Persons who have been involuntarily committed to a correctional institution must be released or transferred to a civil mental institution once it is

found that they are no longer "dangerous", even though they are mentally ill. Correction Law, § 409 (McKinney Supp. 1973-74); Mental Hygiene Law, § 29.13(e) (McKinney Supp. 1973-74). The parole board, on the other hand, releases an individual if it "is of opinion that there is reasonable probability that, if such prisoner is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society," Correction Law, § 213, and only if it is "satisfied that he will be suitably employed in self-sustaining employment if so released," Id., § 214(4). To be sure, a psychiatric report is presented to the parole board in the case of all prisoners. Id., § 214(3), (4). But also before the parole board are a myriad of other details* which can only be indicative of whether the prisoner has "reformed", and which are irrelevant to

---

* "In addition and with respect to all prisoners, the board of parole shall have before it a report from the warden of each prison in which such prisoner has been confined as to the prisoner's conduct in prison, with a detailed statement as to all infractions of prison rules and discipline, all punishments meted out to such prisoner and the circumstances connected therewith, as well as a report from each such warden as to the extent to which such prisoner has responded to the efforts made in prison to improve his mental and moral

(Footnote continued on next page)

dangerousness or mental illness. It is clear from the Executive Order cited by the State that psychiatric reports are meant only for "additional insight." Executive Order No. 5 (1960), 9 NYCRR § 1.5.

(Footnote continued, from page 7)

> condition, with a statement as to the prisoner's then attitude towards society, towards the judge who sentenced him, towards the district attorney who prosecuted him, towards the policeman who arrested him, and how the prisoner then regards the crime for which he is in prison and his previous criminal career. In addition, the board shall have before it a report from the superintendent of prison industries giving the prisoner's industrial record while in prison, the average number of hours per day that he has been employed in industry, the nature of his occupations while in prison and a recommendation as to the kind of work he is best fitted to perform and at which he is most likely to succeed when he leaves prison. Such board shall also have before it the report of such physical, mental and psychiatric examinations as have been made of such prisoner which so far as practicable shall have been made within two months of the time of his eligibility for parole. The board of parole, before releasing any prisoner on parole, shall have the prisoner appear before such board and shall personally examine him and check up so far as possible the reports made by prison wardens and others mentioned in this section. Such board shall reach its own conclusions as to the desirability of releasing such prisoner on parole. No prisoner shall be released on parole unless the board is satisfied that he will be suitably employed in self-sustaining employment if so released."

Correction Law, § 214(4) (McKinney Supp. 1973-74).

This procedure is constitutionally defective because it sets up a more stringent standard of release for one indefinitely incarcerated, solely because he has been committed as a result of a crime. Jackson v. Indiana, 406 U.S. 715 (1972). Such a standard increases the probability that Larry Hayden's indefinite incarceration will continue -- and for reasons that have no relevance to the reasons that he was so confined in the first place.*

---

* "Baxstrom did not deal with the standard for release, but its rationale is applicable here. The harm to the individual is just as great if the State, without reasonable justification, can apply standards making his commitment a permanent one when standards generally applicable to all others afford him a substantial opportunity for early release.

"As we noted above, we cannot conclude that pending criminal charges provide a greater justification for different treatment than conviction and sentence. Consequently, we hold that by subjecting Jackson to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses, and by thus condemning him in effect to permanent institutionalization without the showing required for commitment or the opportunity for release afforded by [civil commitment statutes]..., Indiana deprived petitioner of equal protection of the laws under the Fourteenth Amendment." 406 U.S. at 729-30 (footnote omitted).

In addition, Larry Hayden is not being afforded the benefits of certain procedures available to others who are involuntarily committed to a correctional department hospital. The latter must have their confinements periodically reviewed by a court, and de novo review of that court's decision, by a jury presided over by a different judge, is available. Correction Law, § 409 (McKinney Supp. 1973-74; Mental Hygiene Law, §§ 29.13(e),(f), 31.35 (McKinney Supp. 1973-74). In contrast, a parole board hearing is not a judicial proceeding; procedural due process protection at the hearing is limited (e.g., Matter of Briguglio v. New York State Board of Parole, 24 N.Y. 2d 21 [1969] where the Court held that a prisoner in a parole release proceeding is not entitled to a full adversary-type hearing, including the right to have counsel present), and the parole board's decision is unreviewable (Correction Law, § 212[10] [McKinney Supp. 1973-74]; Matter of Briguglio v. New York State Board of Parole, supra).

Again, the Supreme Court has clearly indicated that to deny such procedural rights to certain individuals indefinitely incarcerated where those procedures are available to those committed under other statutes, is a violation of the Equal Protection Clause. Jackson v. Indiana, supra; Humphrey v. Cady, supra, Baxstrom v. Herold,

supra. See also United States ex rel. Schuster v. Herold, supra.

What is really happening is that while the "program" and the Constitution require stringent protections for Larry Hayden because of his indefinite incarceration, the State has lumped him together with other criminals, both as to the type of detention and the procedures available for release. Larry Hayden is a "square peg" whom New York has forced into a "round hole."

The State's reliance on Larry Hayden's meetings with the parole board only illustrates the complete absence of any justification for the discrimination inherent in continuing to incarcerate him indefinitely under an obsolete classification.

CONCLUSION

For the foregoing reasons, and for all the reasons set forth in the main brief submitted on behalf of Petitioner-Appellant, the order of the District Court should be reversed and the case remanded for the issuance of a writ of habeas corpus.

Respectfully submitted,

MICHAEL H. RAUCH
MELVIN WEINBERG
Attorneys for Petitioner-Appellant
Office & P. O. Address
120 Broadway
New York, New York 10005

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Rudene Logan, being duly sworn, deposes and says that she is employed by Fried, Frank, Harris, Shriver & Jacobson. That on the 15th day of July, 1974, she served the within Reply Brief for Petitioner-Appellant upon the Attorney General of the State of New York at No. 2 World Trade Center, New York, New York 10007, attorneys for the Respondent-Appellee, John R. Zelker, by depositing a true copy of the same securely enclosed in a postpaid wrapper in an official depository maintained and exclusively controlled by the United States at No. 120 Broadway, New York, New York 10005 directed to said attorneys, this being the address designated by them for that purpose upon the preceding papers in this action, or the places where they kept an office between which places there then was and now is a regular communication by mail.

Deponent is over the age of 18 years.

Rudene Logan
RUDENE LOGAN

Sworn to before me this
15th day of July, 1974.

Notary Public

JEFFREY M. SIGER
Notary Public, State of New York
No. 24-8992925
Qualified in Kings County
Certified in New York County
Commission Expires March 30, 1976